THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JANUARY 29, 1875. { Hon. JOHN F DILLON, Contributing Editor.

OUR correspondent at Detroit, Henry A. Chaney, Esq., sends us an interesting decision of the Supreme Court of Michigan, on constitutional law—Mok v. The Building Association—which, together with a note by him, we present to our readers in this issue.

IN A previous issue (*ante*, p. 17) we announced the name of Franklin Fiske Heard, Esq., of Massachusetts, as among our special contributors. We now have the pleasure of presenting our readers with an article from his pen on the "Curiosities of the Law Reporters." Should any of them be disposed to complain that in occasionally publishing articles of a lighter character, like this, we deviate from our purpose of making the JOURNAL practically useful, we beg them to read the article first, and we will argue the question afterwards.

A CORRECTION.—We call attention to a letter elsewhere printed, in which a correspondent calls attention to an error into which we fell in a previous issue (*ante*, p. 38), in our observations upon the case of Brown v. The Levee Commissioners. It will be seen that our misconception of the case arose from the fact that the facts were imperfectly stated in the opinion—a circumstance which was not known to us at the time. Members of the profession who favor us with court opinions for publication are earnestly requested to supplement them with a separate statement of the facts, whenever it is necessary to a full understanding of the case.

Was Shakspeare a Good Lawyer?

A self-made man (we use this term in its popular acceptation), no matter how vigorous his intellect, will, at some time or other, either by misquoting Latin, mispronouncing English, or falling into historical mistakes, display in painful and egregious mannér his lack of early cultivation and general knowledge. And a single blunder may suffice to tell the whole story. The exposure may be as instant, conclusive and overwhelming as though there had been a thousand blunders instead of one. The secret betrayed is that its author has not had the advantage of an early and systematic training, and that his knowledge, instead of being uniform and consolidated, breaks out here and there in spots, and is crooked and irregular. Shakspeare, wonderful as was his genius, was no exception to this rule; and if those who think it profitable to waste their precious energies in the vain attempt to show that Lord Bacon was the author of the plays attributed to Shakspeare, would direct their attention to the blunders made by Shakspeare, which a man of Bacon's learning never could have made, they would encounter difficulties very hard to get over. The argument of these critics is, that there are things in Shakspeare's plays which a man of his limited knowledge could not have written, and which no living man but Bacon could. To this may be opposed the consideration that there are things in those plays which a man of Shakspeare's attainments might have written, but which no man of Bacon's attainments would.

We are led to these reflections by the fact that the editor of the Albany Law Journal, in a recent article, expressed the opinion that "Shakspeare's law is generally sound." Whereupon a very acute correspondent, writing from Emporia, Kansas (11 Alb. L. J. 45), takes issue with him, and quotes at length from the court scene in the Merchant of Venice, to show that the law, as laid down by the young doctor of laws, involves a stupid violation of the familiar maxim of law that "when the law granteth anything to anyone, that also is granted without which the thing itself cannot be." In other words, the law having granted to the Jew a pound of Antonio's flesh—the language of the play being "the court awards it, and the law doth give it,"—it granted also the shedding of as much blood as was necessary to secure that pound of flesh. And this, to our mind, seems a forcible impeachment of Shakspeare's law. Indeed, the conclusion to which the young doctor arrives, is as nonsensical as it would have been to hang the surgeon who "drew blood in the streets" of Bologna in order to save the man who had fallen down in a fit.

But another objection to Shakspeare's law presents itself in our mind in this scene, and it is, that the sentence of the court is pronounced, not by the Duke himself who was sitting personally in judgment, but by the young doctor who had been sent by Bellario, the learned doctor of Rome, the latter pretending to be sick and unable to come, and who was therefore little better than a volunteer. It was the Duke who presided in the court, who had promised to grant Shylock justice, and who, it should seem, ought to have pronounced the sentence. But this objection would not have conclusive force unless it could be shown that it did not conform to the course of procedure in trials in Venice, and perhaps not even then; for it may have been thought best to make historical propriety yield to the purposes of the play.

There is one passage, however, in this court scene, into which none but an ignorant man could have blundered, and which, to our mind, is conclusive evidence that, unless this play has been garbled, it was not written by Francis Bacon. It is that passage in which Shylock thus addresses the Duke:

> I have possessed your Grace of what I purpose;
> And by our holy Sabbath have I sworn
> To have the due and forfeit of my bond:
> *If you deny it, let the danger light*
> *Upon your charter and your city's freedom.*

Here we have the executive head of a sovereign state addressed by one of its subjects as though he was the mayor of an English borough, holding its franchises by the precarious tenure of a royal charter! Nothing could be more absurd. This simple passage lets the adherents of the Bacon theory down with a sudden tumble, and farther than they can build themselves up in a hundred pages.

Curiosities of the Law Reporters.

Sir Harbottle Grimston wrote of his father-in-law, Sir George Croke, that he was continued one of the judges of the King's Bench, "till a *certiorari* came from the Great

Judge of heaven and earth to remove him from a human bench of law to a heavenly throne of glory." Preface to Cro. Eliz.

Sir Francis Palgrave relates this anecdote: Within memory, at the trial of a cause at Merioneth, when the jury were asked to give their verdict, the foreman answered: "My Lord, we do not know who is plaintiff or who is defendant, but we find for whoever is Mr. C. D.'s man." Mr. C. D. had been the successful candidate at a recent election, and the jury belonged to his colour. On the Authority of the King's Council, p. 143.

The Term Reports, when they use the very language of Lord Kenyon, often contain a series of broken metaphors. For example: "If an individual can *break down* any of those safeguards which the Constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts." Townsend's Lives of Twelve Eminent Judges, Vol. I. p. 79.

"When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of *property*" Regina v. Mawgridge, Kelyng, 137.

In truth, as was said by Wilmot, C. J., "the common law is nothing else but statutes worn out." Collins v. Blantern, 2 Wils. 341, quoted by Willes, J., in Pickering v. Ilfracombe Railway Co., L. R. 3 C. P. 250.

In Commonwealth v. Meriam, 14 Pick. 518, which was an indictment for adultery, it was held that other instances of improper familiarity between the defendant and the same woman, might be given in evidence to corroborate the witness. But such evidence has been rejected, the court say, "where it tends to show a *substantial act* of adultery on a different occasion." Thayer v. Thayer, 101 Mass. p. 112.

HOLT, C. J.—"If a man solicits a woman and goes gently to work with her at first, and when he finds that will not do, he proceeds to force, it is all one continued act, beginning with the insinuation and ending with the force. And this being an attempt and solicitation to incontinency, coupled with force and violence, it does by reason of the force which is temporal, become a temporal crime in the whole. An indictment will not lie for a plain adultery, but libel in the Spiritual Court will." Rigault v. Gallizard, Holt, 51.

"Hearsay is no evidence. But it may be admitted in corroboration of a witness's testimony." Gil. Ev. 890. Kelyng Appendix to 3d ed. 92.

In the thirtieth edition of Burn's Justice, vol. III. p. 1031, note, it is said: "It seemeth to savor not much of gallantry that one's ancestors supposed none but women could be guilty of being a common scold; for the technical words denoting the same, whilst the proceedings were in Latin, were all of the feminine gender; as *rixatrix*, *calumniatrix*, *communis pregnatrix*, *communis pacis purturbatrix*, and the like."

A curious instance of the plea, *molliter manus imposuit*," occurs in a case reported in Levinz. Ashton v. Jennings, 2 Lev. 123. The plea to an action for assault and battery was, that the female defendant, being the wife of an esquire and justice of the peace, the female plaintiff being the wife of a doctor in divinity, assumed to go before her at a funeral at Plymouth, whereupon the defendant gently laid her hands upon her to displace her, as she lawfully might. The court, without deciding the question of precedence, gave judgment for the plaintiff.

Lord Bacon writes that certainty is so essential to law, that law cannot even be just without it. "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?" 1 Corinth. xiv. 8. So, if the law gives an uncertain sound, who shall prepare to obey it? It ought, therefore, to warn before it strikes. It is well said also, "That that is the best law which leaves least to the discretion of the judge. Arist. Rhet. i. 1; and this comes from the certainty of it. De Augmentis, viii. Aph 8, Vol. V. p. 90, ed Spedding.

J. was indicted for battery of L., and sued R. in trespass for the same battery; plea, *son assault demesne*, and issue thereon. T. H., one of those who indicted (found the bill), was of the inquest on the trial of the action of trespass, and gave a verdict for the plaintiff, with twenty shillings damages; and T. H. was committed to the custody of the marshal, and fined for two causes, one of which was that he was one of the indictors of the said J., whom now he has acquitted, and did not challenge himself. Lib. Assis. 40 Edw. III. f. 241 A. pl. 10. See Bro. Ab. Challenge 142; 21 Vin. Ab. 256; Trial (B. d.) pl. 14; 8 Ad. & El. 834 note.

Lord Coke says that Moses was the first law reporter. Preface to 6 Rep. p. xv.

If a pauper be nonsuited, the usual practice is to tax the costs, and for nonpayment to order him to be whipped. Bac. Ab. Pauper D. Salkeld reports: "I moved that a pauper might be whipped for non-payment of costs upon a nonsuit, and the motion was denied by Holt, C. J., saying he 'had no officer for that purpose, and never knew it done.'" 2 Salk. 506, pl. 1.

Ascough *et al.* v. Lady Chaplin, Trin 4 Geo. II. 1730. Cooke 93, 3d ed.; 2 P. Wms. 591; 2 Eq. Cas. Ab. 780; Mosely 391, S. C. A writ *de ventre inspiciendo*, returnable Tres Mich., on the behalf of Edward Ascough, Esq., and Elizabeth, his wife, Anne Chaplin, spinster, Charles Fitzwilliams and Frances, his wife, co-heirs of Sir John Chaplin, Bart., their brother, against dame Elizabeth Chaplin, widow of the said Sir John; the writ was returned that the lady was with child, and a motion made for the safe custody of her until her delivery; it was suggested that the lady's mother was likewise with child, and therefore neither she nor any other woman with child were proper persons to be with her; the court agreed that such a clause should be inserted in the writ, and ladies were named on the part of the prosecutors or heiresses, to attend the lady during her pregnancy and till her delivery, but they must not name any spinster; and the mother was allowed to visit only.

In a very recent case in Tennessee we find one of the learned judges saying: "The same doctrine is to be found in Bracton, *Lord* Bacon, in Bacon's Abridgment, and was a maxim of the civil law." Girdner v. Stephens, 1 Heiskell, 286.

In an old case—Bagnal *contra* Langton, Mich. T., 9 Jac. 1—a man stole his wife against her friends' consent, and sued them for her portion in this court—the Court of Chan-

cery, but was refused relief on the ground, as it was quaintly stated by Sir Thomas Egerton, that "he who steals flesh let him provide bread how he can."

"We must not steal leather to make poor men's shoes," said Mr. Justice Twisden in Earl of Plymouth v. Hickman, 2 Vern. 167.

The virtue of woman does not consist merely in her chastity. 2 Atkyns, 338; 1 Coop. Temp. Cottenham, 537 note.

The following language used by Maule, J., in Martindale v. Falkner, 2 C. B. 720, is characterized by Blackburn, J., in Regina v. Mayor of Tewksbury, L. R. 3 Q. B. 629; 37 L. J. Q. B. 288, as clear and common sense: "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

In The Protector v. Geering, Hardres, 85, 99, Atkins says, *arguendo:* "Errors are like felons and traytors; *any* man may discover them; they do *caput gerere lupinum*." See 1 Man. & Gran. 16 note.

Testators should be prevented, if possible, "from sinning in their graves." This expression, which has become one of the current bye-phrases always used in courts of equity on the fitting occasion, fell from Sir John Strange, in Thomas v. Britnell, 2 Ves. Sen. 314.

An inhabitant in a county goes with wares in the same county from one house to another to sell them. He is a *rogue* within the statute of 39 Eliz. cap. iv. and other statutes. Jenk. Cent. viii. Cas. 16.

In a case in which it was held that a bond in consideration of past cohabitation is good in law, Mr. Justice Bathurst "pleased the sanctimonious by enriching his judgment" with quotations from the books of Exodus, ch. xxii. v. 16, and Deuteronomy, ch. 22, v. 28, 29, to prove that "wherever it appears that the *man is the seducer*, the bond is good." Turner, spinster, v. Vaughan, 2 Wils. 339. We wonder when a case will occur in which the question of the validity of the bond, the woman being the seducer, shall be solemnly adjudged and reported.

Thomas's case—Dyer 996, quoted in Phillimore's Law of Evidence, 136. One witness of his own knowledge, and another of hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.

The marginal note to Clement's case, 1 Lewin C. C. 113 (1834), runs thus: "Possession in Scotland evidence of stealing in England." This is the summary of a case of horse-stealing tried at Carlisle, the evidence being that the horse was a few days afterwards found in the prisoner's possession, across the border, and it has been made the ground for much gibing, by the English, at the acquisitive propensities of their northern brethren.

"The court of equity in all cases delights to do complete justice, and not by halves." Per Cur. in Knight v. Knight, 3 P. Wms. 333.

Rex v. Johnson. Comberbach, 377. Fine or indictment for lying with another's wife prevents an action. Q.

The defendant appeared to be fined upon an indictment for seducing and living with another man's wife. North moved to charge him with an action, but the court would not suffer that, now he comes to submit to a fine.

The criticism of Lord Chief Justice Willes on Piggott's Treatise of Common Recoveries, is not, *mutatis mutandis*, without its application to some of the text books of the present day. "Piggott," he says, "who was as able a conveyancer as any man of the profession, has confounded himself and everybody else that reads his book, by endeavoring to give reasons for, and explain common recoveries. I only say this to show that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense." Martin v. Strachan, 1 Wils. 73.

In a recent volume of "Reports of Cases Argued and Determined in the Court of Appeals of the State of New York," is this marginal note, and this only: "Judgment affirmed of course." Lyman v. Wilber, 3 Keyes, 427.

In an action for scandalous words spoke of a justice of the peace, the court observed: "There is not much difficulty in this case, but there is no end of citing and answering cases. The plaintiff here is said to be a justice, yet no special damage laid in the case; the office of justice of the peace is not so considerable but that many people choose to decline it." Palmer v. Edwards, Cooke, 242, 3d ed.

By the Court: "You cannot charge your attorney without leave of court, to be obtained on motion, though he be ever so great a cheat. 7 Mod. 50.

By Holt, Chief Justice.—If we see one against whom there is a judgment of this court, walk in Westminster Hall, we may send our officer to take him up, if the plaintiff desire it, without a writ of execution. 7 Mod. 52.

Mr. Justice Putnam, in considering the subject of the conclusiveness of judgments, remarked, that if the principle were otherwise, "the law would become a game of frauds, in which the greatest rogue would become the most successful player." M'Rae v. Mattoon, 13 Pick. 58.

Memorandum. 1 Mod. 9. Seventeen Serjeants being made the 14th day of November, a day or two after, Serjeant Powis, the junior of them all, coming to the King's Bench Bar, Lord Chief Justice Kelyng told him, that he had something to say to him, viz.: that the rings which he and the rest of the Sergeants had given, weighed but eighteen shillings apiece; whereas Fortescue, in his book "*De Laudibus Legum Angliae*, says: "The rings given to the Chief Justices and to the Chief Baron ought to weigh twenty shillings apiece;" and that he spoke not this expecting a recompense, but that it might not be drawn into a precedent, and that the young gentlemen there might take notice of it.

The statute of Merton, so called because the Parliament or Council sat at the Prio y of Merton in Surrey, was passed in the twentieth year of the reign of Henry III., A. D. 1236. It is a remarkable fact that women were summoned to this council. *Omnes uxores comitum et baronum qui in bello occisi fuerunt, vel captivorum.* Gale, *Annales Waverleienes.* Spilsbury's Lincoln's Inn and Library, pp. 200, 201.

In an action for words spoken of the plaintiff, viz.: "She is a whore, a common whore, and N's whore," all the court were of the opinion that these words are not actionable, *being only scolding.* Osborn v. Wright, 2 Mod. 296.

The parents of trusts were *fraud and fear*, and a court of conscience was the *nurse*." Attorney-General v. Sands, Hard. 491, quoted in Perry on Trusts, I. 3 note.

SCROGGS, Chief Justice—"As anger does not become a judge, so neither doth pity, for one is the mark of a foolish woman, as the other is of a passionate man." The King v. Johnson, 2 Show. 4.

The old English lawyers occasionally rejected the evidence of women on the ground that they are *frail*. Best Ev. I. 64, citing Fitzh. Abr. Villenage, pl. 37, Bro. Abr. Testmoignes, pl. 30.

The Albany Law Journal makes mention of a statute of New York, which allowed deductions of a certain number of days to be made, on account of good behavior from the term of imprisonment of convicts, with a proviso that the statute should not apply to any person *sentenced for the term of his natural life*.

"Judgment was given against a man of 40 years of age, and he brought a writ of error, and he assigned infancy for error, and the attorney was punished by the Court." Per Holt, C. J., in Pierce v. Blake, 2 Salk. 515.

In Jenkins' Centuries it is said: "A., a woman of twelve years of age married B., of thirteen years of age; A., has issue; this is a bastard in our law. Yet some write that Solomon begot Rehoboam at ten years of age, by the computation of the Scriptures." Cent. VII. Cas. 26. See also Cent. II. Cas. 84, citing Year Book, 1 Hen. VI. 3.

In a very recent case Chief Justice Chapman observed that "Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it." Atwood v. Scott, 99 Mass. 178.

It is said in March on Arbitrements, 215, that a non-suit "is but like the blowing out of a candle, which a man, at his own pleasure, lights again." Quoted by Metcalf, J., in Clapp v. Thomas, 5 Allen, 159.

Lord Eldon mentions a remarkable instance as regarded himself, of the uncertainty of evidence as to handwriting. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnessess. One of them purported to be by Lord Eldon himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon had never attested a deed in his life. Eagleton v. Kingston, 8 Ves. 473. Quoted by Mr. Justice Coleridge in his judgment in Doe v. Suckermore, 5 Ad. & El. 716, and 2 Nev. & Per. 34.

In the Court of King's Bench, women were early engaged as counsel. In a case in Lord Raymond, we find Mrs. Cheshyre counsel with the plaintiff. Vincent v. Beston, 1 Ld. Raym, 716, A. D. 1702.

Sir Bartholomew Shower's mode of treating Monmouth's invasion is excellent for its brevity. "Memorandum—In Trinity term Monmouth's rebellion in the west prevented much business; in the vacation following, by reason of that rebellion, there was no assize held for the western circuit; but afterwards five judges went as commissioners of oyer and terminer and goal-delivery, *and three hundred and fifty-one of the rebels were executed, &c.*" 2 Show. 234.

When sitting in the Rolls Court, indignant at the conduct of one of the parties, Lord Kenyon astonished his staid and prosaical audience by exclaiming, "This is the last hair in the tail of procrastination!" Whether he plucked it out or not, observes Mr. Townsend, the reporter has omitted to inform us. Lives of Eminent Judges, Vol. 1. p. 79.

In Mr. Goldwin Smith's Sketch of Pitt, it is related that Lord Eldon, at that time Attorney-General Sir John Scott, "opened his attempt to procure the capital conviction of a man who, he knew, had done nothing worthy of death, with a pathetic exordium on his own disinterestedness and virtue. He should have nothing to leave his children but his good name. And then he wept. The solicitor-general wept with his weeping chief. What is the solicitor weeping for? said one bystander to another. He is weeping to think how very little the attorney will have to leave his children." The North American Review, Vol. CXIV. p. 78. F. F. H.

Constitutional Law—Amendment or Alteration of Statutes—Corporations.

ANDREW MOK *ET AL* v. DETROIT BUILDING AND SAVINGS ASSOCIATION No. 4.

Supreme Court of Michigan, January Term, 1875.

Hon. BENJ. F. GRAVES, Chief Justice.
" ISAAC P. CHRISTIANCY, } Associate Justices.
" JAMES V. CAMPBELL, }
" THOMAS M. COOLEY. }

Constitutional Law—Form of Statutes.—An act to authorize proceedings under another act, which simply refers for its rule of action to a third, the provisions of the latter being left unchanged for their original purposes, but modified by the act in question for its own purposes, is void, because it violates the constitutional principle that the amended parts of an act shall be re-enacted at length.

Mr. Justice COOLEY delivered the opinion of the court.

The constitution of the state provides that "no law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended, shall be re-enacted and published at length." Art. iv, § 25. The application of this section to certain acts of legislation, is the principal question presented by this record. No one questions the great importance and value of the provision, nor that the evil it was meant to remedy was one perpetually recurring and often serious. Alterations made in the statutes by mere references and amendments, by the striking out or insertion of words without reproducing the statute in its amended form, were well calculated to deceive and mislead not only the legislature as to the effect of the law proposed, but also the people as to the law they were to obey, and were, perhaps, sometimes presented in this obscure form from a doubt on the part of those desiring or proposing them, of their being accepted, if the exact change to be made were clearly understood. Harmony and consistency in the statute law, and such a clear and consecutive expression of the legislative will, on any given subject, as was desirable, it had been found impracticable to secure without some provision of this nature, and as the section requires nothing in legislation that is not perfectly simple and easily followed, and nothing that a due regard to clearness, certainty and simplicity in the law would not favor, it is probable that if the requirement has at any time been disregarded by the legislature, the default has proceeded from inadvertence merely.

Whether there has been such inadvertence in the legislation now questioned, is the point in dispute.

The act "to authorize the formation of corporations for building and leasing houses and other tenements," was passed by the legislature of 1855, and in a single section it provided that corpo-

rations, for the purpose indicated in the title, might be formed under the provisions of an act "to authorize the formation of corporations for mining, smelting, or manufacturing, iron, copper mineral, coal, silver or other ores or minerals, and for other manufacturing purposes," approved February 5, 1853, and should have and possess all the rights, and be subject to all the liabilities provided in said act, and the acts amendatory thereof.

A second section was subsequently added, making special provisions for corporate debts and obligations, and the acquisition, control and disposition of real and personal property, but they are not material here. The first section was left to stand as first enacted, and the only method provided for the incorporation of building and leasing companies, was by the reference made to the previous act which had in view organizations for purposes essentially different. This was at least awkward, especially as some of the rights and liabilities given and provided for by the mining and manufacturing incorporations' act, were, from their nature, peculiar to the kinds of business those incorporations were to engage in, and to the reports they were required to make thereof; so that it could not be strictly true that the building and leasing corporations would possess all the rights, and be subject to all the liabilities of the corporations after the model of which they were to be formed.

The act, by permission of which the defendants claim to be incorporated, was passed in 1869, and, by its first section, provides that "corporations for building and savings associations may be formed and incorporated under the provisions" of the act of 1855, the substance of which has been already given. Now, as it was impossible to organize under an act, the whole purpose of which was to give permission to find in another act the outline of an organization which it did not itself provide, the reason for referring to the act of 1855, is not very manifest. Had there been any desire or design on the part of the draftsman of the act of 1869, to avoid presenting to the mind of the legislature the incongruities that must result from the attempt to organize corporations of a nature essentially different under the same enabling statute, the wording of the act was well adapted to that end, for while it mentions building and leasing associations as those upon the model of which the corporations for building and savings purposes—which might well be supposed akin to them—were to be found mining and manufacturing corporations, which were to be the real model, were not once named, nor was the act referred to under which they are formed, except blindly by its number as a chapter of the Compiled Laws. But whatever the real purpose, it cannot fail to be the subject of conjecture, when we are thus sent to one act for no other ostensible object than to be there told we must go to still another when a direct reference to such last mentioned act in the first instance would have been much more simple, natural and proper, and much less confusing and questionable.

But while the act of 1869 referred parties in this circuitous manner to that of 1853, for the requirements in organization, it undertook at the same time to dispense with some things required by that act, and to make some changes. It provided that the articles of association need not state the amount of capital stock actually paid in; that it should be contributed in initiation fees and in weekly or monthly sums, as should be provided by by-laws; that it should not exceed $300,000; that certain things specified should be set-forth in the articles, which were not required by the act of 1853; that in addition to facts required to appear by the annual reports under the last mentioned act, the uses of all moneys received and expended during the year should be reported; that no moneys should be used for any persons not stockholders; that parents and guardians might take stock for minor children and and wards, and that no premium given for priority of loan or acquisition of building, or discount given on the redemption of shares, should be deemed usurious. This is a statement of the whole substance of the act, and it will be seen that its provisions are few and vague, and that for the whole framework of the corporations, to be formed by its permission, the associates are referred to the act of 1855, which in turn refers them to the act of 1853, where, except in a few particulars, and most of those unimportant, they are to find their law and their guide in organizing and conducting their corporate affairs.

Is this act constitutional? We have hitherto had very little occasion to consider the section of the constitution under which this question is made, because there have been few cases in which such a question could plausibly be made. Amendments of statutes by implication we have held are not forbidden by it. People v. Mahaney, 13 Mich. 481; Underwood v. McDuffee, 15 Mich. 361. But this is not a case of that nature, as all the alteration we have reason to suppose the legislature designed to make in the act of 1853, to adapt it to the purposes of the act of 1869, are made in express terms. The present case is certainly peculiar. In one sense the mining and manufacturing act has not been amended at all, and it stands on the statute book, for all the purposes of the associations originally contemplated by it, quite unaffected by the act of 1869. But as regards the objects and purposes of building and savings associations, it is quite otherwise. If private individuals had, by contract, in like manner, referred to some pre-existing writing which was to be the measure of their rights and obligations, except as by the contract may otherwise have been provided, it would have been said that the previous writing, as thus modified, had been incorporated in, and made a part of, the contract itself. The case is the same here. The act of 1853 has been, for the purposes of building and savings associations, incorporated in, and made a part of, the act of 1869, but with several changes and modifications, and these not made by the re-enactment of the sections changed or modified, but only by indicating the extent of the changes, leaving the parties concerned to fit the new act to the old as best they may. It is unfortunate for those who have had occasion to attempt it, that this case illustrates so forcibly the evils of this species of legislation, for on many points it is impossible, in seeking for the legislative intent, to get beyond the regions of pure conjecture.

It may be desirable here, in order to avoid all possible misapprehension, to state, distinctly, what the act of 1869 is not. It is not a statute which merely refers a body of associates to a pre-existing law which is suited to their purposes, and under which they are to be permitted to incorporate themselves. Upon a statute of that description we abstain from remarking, because the act of 1869 assumes the act of 1853 was in many respects unsuited to its purposes, and undertook to modify and adapt it to them. It was, in fact, much more unsuitable than the legislature, judging from the changes made, seem to have supposed, as we shall have occasion to point out further on; but for our present purposes it is sufficient to state that some changes were deemed essential, and that they were made by indirection. Had the act of 1853 been one for the incorporation of building and savings associations, a subsequent act attempting for their purposes such modifications of it as were designed to be made by the act of 1869, would be so manifestly in conflict with both the spirit and the letter of the constitution as to preclude any plausible argument in its support, and it is not readily perceived that it can be less so, because of its leaving the original act untouched for some purposes, while altering it after the forbidden method for others.

It is possible that there may lie back of the constitutional difficulty, the question whether the act of 1869, taken in connection with that of 1853, has prescribed any definite course of action by which associates can be sufficiently guided in perfecting organizations under it. It is certain, at least, that these associates have not found the two acts sufficient or satisfactory for their purposes, and in several particulars, have made law for themselves in framing their articles. The first act required the articles of association to state distinctly and definitely the term of existence of the

proposed corporation, not to exceed thirty years. This provision has not been followed in this instance; but the associates provide by their articles that the association shall be dissolved "as soon as one, and every shareholder, shall have received, on every one of his or her shares, the sum of one hundred and twenty-five dollars," that is, including the premiums that have been granted by the shareholders themselves. This indefinite period may be five years, or it may be twenty-five, it is an uncertain period which may depend upon the success of the corporation or the will of its members, while the statute contemplated a certain and fixed period subject to no such contingency. It is perhaps unfortunate that in thus departing from what would seem the purpose of the statute, the associates did not succeed in making their own meaning more unequivocal; for this provision leaves us in very great doubt whether, by the clause "as soon as one, and every shareholder, shall have received, on every one of his or her shares, the sum of one hundred and twenty-five dollars," etc., we are to understand as soon as the corporation shall have means sufficient to make such payments, or whether, on the other hand, the meaning is, as soon as the last shareholder shall have applied for, and received his share under the rules of the association. Either construction is, perhaps, admissible, but the latter seems most natural, and if lawful, might continue the corporation, at the option of non-borrowing members, for the full period of thirty years, which, by the constitution, is made the limit of all such corporations, and might result in very great injustice and oppression to borrowers. The other construction would be less open to objection on the score of justice, and would be likely to terminate the existence of the corporation within a short period, unless it should be managed badly and meet with serious losses.

The departure from the statute in some other particulars is equally manifest. Under the act of 1853 the shares of stock were to be twenty-five dollars each. There is no intimation in the act of 1869 that any departure from this standard was to be permitted. Nevertheless, these associates have fixed their shares at $125 each. With the same warrant they might as well have made them either ten dollars or ten thousand.

This may be considered matter of form only, but some other particulars may be noticed of more importance. The act of 1853, as amended, makes particular provision, by its fifth section, for annual reports to be filed in the office of the secretary of state and of the county clerk. The act of 1869 contemplates a similar report, and enumerates some further points to be covered by it. The failure to make the report under the first act is made a misdemeanor in the directors, punishable by a heavy fine; but the section which provides therefor, applies by its terms only to mining companies, and it is, to say the least, matter of very grave doubt if failure of the directors of building and savings associations to make report, is punishable at all, or whether, if they neglect to make one, there is any means of compelling it. Counsel, consulted on the subject, might very probably advise them, in entire sincerity, that criminal laws were not to be extended by construction, and that as this penalty, by its terms, was made applicable to mining companies only, the directors of building and savings associations could disregard the requirement of a report with impunity. It is not likely this was what the legislature intended, but it is one of the probable results of attempting to make incongruous things harmonize.

Are these building and savings associations to pay any taxes? On this very important subject we are left wholly to conjecture. Mining and manufacturing corporations are required to pay taxes, and the incorporation act contains penal provisions to compel separate reports as a basis of taxation. See §§ 18, 19, 20, 21, 23. Permission to companies of another description to become incorporated "under the provisions" of this act, would seem to imply an understanding that they were to do so, subject to this very important requirement, unless the permissory act expressly exempted them, which the act of 1869 does not. But here, again, there are no penal provisions applicable to building and savings associations, by means of which to compel the performance of any duty looking to taxation, and no basis is prescribed according to which taxation can be laid. We may suppose, therefore, that the legislature regarded these associations as being rather benevolent or charitable societies than societies for the pecuniary profit of their members, and consequently the proper subjects of exemption, or with equal reason, that without examining in detail the act for the incorporation of mining and manufacturing companies, they assumed that as all companies organized under it were taxable, so all permitted to organize "under its provisions" would also be taxable. Whatever intent may have been in the minds of the legislators, we have no reason to believe that if these associations were to be incorporated for the pecuniary profit of their members, or of the non-borrowing portion thereof, the legislature would intentionally have sanctioned it, without some adequate provision compelling them to bear their proportion of the public burdens.

The act of 1853 makes the stock, subscribed to corporations formed under it, subject to be called in at any time by "the directors. The act of 1869 makes the capital stock payable in initiation fees and in weekly or monthly sums of money, as shall be provided by the by-laws of said corporations." Under this provision it seems to be understood by those who organized the defendant association, that subscribers may be compelled to make the weekly or monthly payments, not only until the whole $125 per share is paid in, but afterwards as long as the corporation exists; and those who borrow from the corporation are required to give security that they will do so. What warrant there can be for this we do not very clearly perceive. A subscription for stock can call for no larger payment than the sum subscribed, and when that is completed the obligation is fulfilled. Whether by-laws, requiring payments to be kept up during the whole life of the corporation, can be burdensome or unjust, must depend upon the period of its existence, and the provision, if any, for the distribution of its assets. If, as the complainants understand, the organization in this case, it is to continue until the expiration of thirty years, or until the non-borrowing members voluntarily wind up its affairs, and its assets are then to be divided among those who have not been borrowers, the injustice will be so enormous that no legislature would, even for a moment, consider the proposition to permit it; for it might result in compelling the poor borrowers to pay many times over the sums borrowed, and to submit, during the life of the corporation, to have their real-estate mortgaged to secure weekly or monthly payments on "stock," in the accumulations of which they, although "stockholders," were not to share. If, on the other hand, the corporation is to be dissolved as soon as each stockholder can have made up and paid over to him the amount of the stock he has subscribed for, then there can be no inequality in the positions of borrowing and non-borrowing members, provided the statute or the articles of association made proper provision for determining when the necessary moneys had been realized, and how the dissolution might be required or compelled—provisions exceedingly important in the case of corporations where continuous payments are required, but which have not been made for these corporations in any manner.

The twenty-fifth section of the act of 1853, provides that "the legislature may, at any time, for just cause, rescind the powers of any corporation created pursuant to the provisions of this act, and prescribe such mode as may be necessary or expedient for the settlement of its affairs. The legislature may repeal, alter or amend this act." This last paragraph was not necessary, as the power existed under the constitution independent of it, but the first was important. Nevertheless, it is in the nature of a penal provision, and its application to the building and savings associations, without an express legislative declaration to that effect, is exceedingly doubtful. Other important provisions of the act would be equally af-

fected by the principle that punitory laws are to be construed strictly.

But it is needless to extend this sort of enquiry further. It must be perfectly manifest that the three acts under which this building and savings association claims to be organized, furnish no distinct outline for such an incorporation, and that it is impossible to say how much or what part of the general mining and manufacturing incorporations act was meant to be applicable to them. Counsel called upon to frame articles for them under that act, could, at best, only go from section to section, and say this section is applicable and that is not; this, it is politic to appropriate, and that to reject; but when he had concluded his labors, the result could only be the formation of a corporation, under a law which by selection and rejection of sections and parts of sections he had made for the purpose, and not under any law which the legislature had made as his guide; for the act of 1853 has purposes and objects so entirely different that it cannot possibly be a guide in the premises.

The question then recurs, whether the act of 1869 can be supported. In our opinion, formed upon deliberate consideration, and after most able argument, it cannot. While the act of 1853 is left untouched as to the organizations contemplated by its provisions, it is, for the purposes of building and savings associations, altered in most important particulars in disregard of the constitutional requirement. The fourth and fifth sections are expressly amended without re-enacting them in full, and perhaps the same should be said of the eleventh, while others are capable of being made available only by treating the act as revised to meet the exigencies of the case. Unfortunately, the revision is not clearly made by the statute, but is left to the varying opinions, wishes and purposes of those who may have occasion to avail themselves of this legislation. What has been attempted here is to duplicate an act, but, at the same time to accommodate it by indirect amendments to a new class of cases, in disregard of the constitutional provision which requires each act of legislature to be complete in itself, and forbids the enactment of fragments which are incapable of having effect, or of being understood until fitted in to other acts after, by construction or otherwise, places have been made for them. No such legislation can be sustained. Persons claiming such extraordinary powers and privileges as some which are claimed here, should be able to claim them under legislation which is clear and unequivocal, and which leaves no doubt of the purpose of the legislature to grant them.

The whole act of 1869 being, in our view, invalid, we give no attention to minor objections. The decree appealed from must be affirmed, with costs.

NOTE.—The principle illustrated in the foregoing opinion is common in state constitutions, and is stated in the fundamental law of Missouri with still greater precision than in that of Michigan, being so framed in the former state, indeed, as to apply in express terms to the facts of the present case. Section 25 of art. iv of the Constitution of Missouri (1865), is as follows: "No act shall be revived or re-enacted by mere reference to the title thereof; nor shall any act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the act revived or re-enacted, or the act or part of act amended, shall be set forth and published at length, as if it were an original act or provision." Similar prohibitions are found in the constitution of Illinois (Art. iv, § 13), Arkansas (Art. v, §§ 22-3), and Kansas (Art. XI, § 16), and, in less explicit terms, in that of Tennessee (Art. XI, § 17).

This decision is regarded as settling a large number of suits pending in the courts at Detroit, against associations similar to the corporation defendant. Some of these associations have existed for several years, and their mode of doing business is described as somewhat as follows: Each subscriber to a share in the corporation pays in 25 cents per week. From the resulting fund, money is lent in shares to any subscriber who wishes to borrow, but he can borrow only as many shares as he owns shares of stock, and must give to the association a first mortgage on real-estate owned by him, for the par value of such shares. Each share of stock represents $125, but the shares sold average, according to the demand for money, only about $100. Interest to be paid upon each share amounts to 15 cents per week. There is, also, some income from fines, and it was calculated that all shares would be paid up, and that each subscriber would have the full amount of each share paid to him in about seven years. It was found that under these regulations some borrowers had actually more than paid for all the money they had received, together with the legal rate of interest upon it, and a bill was accordingly filed by the complainant, Mok, who had been one of those borrowers, to have his mortgage set aside.

H. A. C.

Deceit—Fraudulent Representations—Scienter.

JOSEPH G. BANNISTER v. JESSE F. ALDERMAN.*

Supreme Judicial Court of Massachusetts, January, 1873.

In an action for inducing the plaintiff to buy a promissory note by false representations as to the credit of the maker, said representations being alleged by the declaration to be known by the defendant to be untrue, the admission or exclusion of evidence offered by the defendant that he did not know that the representations were untrue, depends upon whether the question as to such knowledge has been presented to the jury by the course of the trial, and the plaintiff's conduct of the case; and a ruling of the judge, whether admitting or excluding such evidence, will be presumed correct, and exceptions thereto will not be sustained, unless the bill of exceptions shows it to have been incorrect.

TORT.—The declaration alleged that the defendant, to induce the plaintiff to purchase a promissory note for $2200 of the Metallic Compression Casting Company, endorsed by Jesse A. Locke, made certain specified false representations to the plaintiff, as to the credit of said company and of Locke; that the plaintiff, induced by these representations, bought the note of the defendant; that the representations were false, "all which the defendant well knew;" and that the note was worthless. The answer denied the making of the representations.

At the trial in this court, before Morton, J., the plaintiff testified that he told the defendant, who was a note-broker, that he wished to invest some money; that the defendant brought him a promissory note of the said company for $2200, dated August 1, 1870, endorsed by said Locke; that the defendant said "that he knew all about Locke, that he was worth $100,000 of his own money, that the company owned $50,000 of real estate, had paid $60,000 for its patents and did not owe a dollar, that he knew all about it, that the stockholders were individually liable for the company's debts, that he had 75 shares of the stock, and his partner had some, that the stock was going up and he would not sell, that they had an order of $17,000 they could not fill, that the business was paying 50 per cent., that he had recently sold $7,000 or $9,000 of their notes without an endorser with the stock as collateral, that those notes were not so good as this one, that there was no trouble about this note, and that he should take care of it;" and that the plaintiff, relying upon these representations, was induced to purchase the note. On cross-examination, the plaintiff testified that before this transaction he considered the defendant good, honest and reliable; that he expressed to the defendant that he thought the defendant meant to cheat him; that the defendant said the note was as good as the gold in his pocket; and that he asked the defendant to endorse the note, and he said he could not, because he had agreed with his partner not to endorse any paper. The plaintiff introduced evidence tending to show that early in August, 1870, the company and Locke both failed and subsequently went into bankruptcy; that the company and Locke each owed between $300,000 and $400,000; and that the assets of the company were about $7000, and those of Locke about the same.

The defendant was a witness, and denied that he made the representations as testified to by the plaintiff. His counsel asked him, "at the time you sold this note what was your opinion as to Locke's pecuniary position and ability?" The plaintiff objected to this question, stating that he should not claim to the jury that the defendant knew, or had reason to believe that the company and Locke, or either of them, were insolvent at the time the statements were made, and that he relied exclusively upon the defendant's statement of his knowledge of their condition. The

*This case will appear in 111 Mass. 261, not yet published.

judge permitted the question to be put, and the witness replied that he supposed it to be good.

The defendant also asked several witnesses "what was Locke's pecuniary standing in the community on August 4, 1870?" The plaintiff objected to the question upon the same ground; but the judge permitted the question to be put, and the witnesses answered that it was fair.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

T. H. Sweetser and *W. S. Gardner*, for the plaintiff.
G. A. Somerby, for the defendant.

I. This is an action of deceit, and the declaration, alleges and the answer denies, that defendant made certain false representations, knowing them to be false, to induce plaintiff to purchase certain promissory notes, and that plaintiff did, in consequence, purchase them, to his damage. In this form of action, "the *scienter* is a material and vital element in the case, necessary to be alleged in the declaration, and proved at the trial." Hartford Insurance Company v. Matthews, 102 Mass. 226; King v. Eagle Mills, 10 Allen, 548; Pearson v. Howe, 1 Allen, 207. If so, under this form of declaration the plaintiff must prove the scienter; and the defendant had a right to offer disproof of it.

II. The exceptions of plaintiff are that the court permitted the defendant to offer disproof of the *scienter*, which it was competent for defendant to do. The plaintiff had no power to change the issue at will; nor could he shun the burden of proving the *scienter*, nor prevent defendant from offering disproof of it by saying "he should not claim to the jury that the defendant knew or had reason to believe that the company and Locke, or either of them, were insolvent at the time the statements were made; that he relied exclusively upon the defendant's statement of his knowledge of their condition;" because, this was only equivalent to saying that he could not prove an essential allegation of his declaration, to-wit, the *scienter*; this statement of plaintiff did not change the issue, nor render disproof of the *scienter* by defendant incompetent, if it was competent before.

III. It is admitted by defendant, that an action may be maintained where a defendant makes an untrue representation of a material fact as distinguished from opinion, as of his personal knowledge, upon which plaintiff relies to his damage. Page v. Bent, 2 Met. at p. 374.

But this is merely a legal fraud; the plaintiff has been injured by relying on the *untrue* representations of defendant, made upon his personal knowledge; the defendant may have had *no* intention to deceive, and been honest in making the representations; may have *believed* the representations to have been true, and have violated no rule of morality, still, he is liable to the extent of actual damage suffered by plaintiff. A declaration which alleged defendant made an untrue representation of a material fact, as of his own knowledge, to the damage of plaintiff, would be sufficient for that kind of fraud. An action of deceit involves an intention to injure and deceive; a dishonest purpose, in making the false representations, with no belief that the representations are true, but with knowledge that they are false, involves moral turpitude, is a fraud *in fact*, as well a fraud in law, and might or would render defendant liable for vindictive or exemplary damages.

IV. But disregarding the pleadings and issue, and assume that plaintiff in tort could allege one thing and prove another, could lighten his burden of proof, whenever he found it onerous, without changing the pleadings, still, the testimony admitted was not incompetent. The alleged false representations were as to the pecuniary standing of Locke and the company, were made by seller to buyer, and the seller a known broker, a part of whose general business was to sell promissory notes. Although defendant denied as a witness that he made the representations as testified to by plaintiff, it was a question of fact, under all the circumstances, for the jury to find what defendant in fact said, what he meant, and how the plaintiff understood it, and the jury might find that defendant, in substance, said what plaintiff had testified to, but also find that all the defendant meant, and all plaintiff at the time undestood, was a strong expression of opinion merely, as to the pecuniary condition of Locke and the company. In this particular, the case of Haycroft v. Creasy, 2 East, 92, quoted with approbation in Tryon v. Whitmarsh, 1 Met. 1, and Stone v. Denny, 4 Met. 151, 157, are directly in point.

Mr. Justice Dewey, in the case last cited, says: "It was to be ascertained from all the facts and circumstances connected with the representation and explanatory thereof, what was the real character and effect to be given to the affirmation by the defendant that the schedule was correct, or as correct as could be taken; and whether the representation was to be treated as a statement of a fact, for the entire correctness of which the defendant was understood by the vendee to assert his personal knowledge, or merely that it was an assertion of his belief, upon reasonable grounds for such belief, that the schedule was fairly taken and truly represented the quantity of the articles therein described." And in Page v. Bent, 2 Met. at p. 374, Shaw, C. J., says: "But in a manner of opinion, judgment and estimate, if one states a thing of his own knowledge, if he in fact believes it, and it is not intended to deceive, it is not a fraud, although the matter thus stated is not true in fact." The plaintiff in the present action stated, amongst other things, "that he relied exclusively upon the defendant's statement of his knowledge of their condition." It was not alleged in declaration, nor proved at the trial, that defendant said he had *personal* knowledge of what he represented; the plaintiff claimed that the defendant made the representations from *personal* knowledge; the defendant denied that he made said representations, and claimed that if jury believed he did, under the circumstances, they were only a strong expression of an honest opinion.

So that "defendant's statement of his knowledge of their condition," upon which plaintiff exclusively relied, might be personal knowledge or only a strong expression of opinion, as jury should find the fact to be at the time of the representations; and if jury should find it only a strong expression of opinion, defendant would be liable, if he was dishonest in giving that opinion, or gave it without any knowledge, or being justified by the fact, if plaintiff was misled thereby to his damage; therefore, the testimony of defendant as to what he believed as to Locke's pecuniary ability, and as a justification for such belief, what in fact, was the pecuniary standing of Locke, at time jury found defendant made the representations, was not incompetent.

V. The case of Fisher v. Mellen, 103 Mass. 503, is not an authority to justify the rejection of the testimony admitted in the present case. There, it was not denied, but *admitted*, that plaintiff had offered testimony tending to prove that defendant had made false representations of his personal knowledge of a fact as distinguished from an opinion, to-wit: "as to the land and property of the company," "the condition of the land," and it was admitted that such representations were false; the defendant attempted to introduce evidence as an excuse why he had stated a fact upon his personal knowledge which he admitted was not true; and upon which it was conceded or proved plaintiff relied to his damage; the court excluded the evidence as immaterial. If the false representations had been, or might have been, found by the jury to have been mere opinion, then defendant would have been permitted to have shown that it was an honest opinion, and the facts upon which it would be reasonable for him to have formed such an opinion.

VI. By the pleadings, the defendant had a right to suppose that plaintiff would rely in proof on the case he had alleged of *deceit*; the defendant had a right to enquire of the plaintiff, when on the stand as a witness, whether he thought defendant meant to cheat plaintiff; it was a material question, and the fact that it came out on cross-examination, does not lessen its materiality; the plaintiff replied that he thought defendant meant to cheat him; that was

the way plaintiff then put his own case; and he did not change that position until defendant sought to show that he did not mean to cheat him; then plaintiff attempted through his counsel to put his case on a different ground; as the plaintiff had stated before the jury in answer to a proper and material enquiry, that he thought that defendant meant to cheat plaintiff, as to the subject-matter then examined, and on trial, unless defendant had opportunity to show that he did *not* mean to cheat him, the jury might become prejudiced against defendant, and think him less worthy of credence, and might impair, if not destroy the value of his testimony as a witness.

WELLS, J.—This case is like Fisher v. Mellen, 103 Mass. 503, in its substantial features. Both are in tort, for false representation of facts susceptible of knowledge and made by the defendant as of his own knowledge. In both, the declaration, after alleging the untruth of the statements relied on, proceeds to add "all which the defendant well knew." In both, therefore, the evidence offered by the defendant was within the issue as presented by the pleadings, and it did not appear that the plaintiff proposed to narrow the issue, or gave any notice that he intended to do so, until the defence was opened and entered upon. The evidence offered was similar, and equally competent in each case. In Fisher v. Mellen, it was excluded by the judge at the trial, and the ruling was sustained by this court. In the present case it was admitted, and we think the ruling admitting it must be sustained.

The difference results from the fact that the position of the question, as it arises in the two cases, is reversed. It is incumbent upon the excepting party to show that the ruling was wrong as applied to this case, and that he has suffered, or was liable to suffer prejudice thereby.

In these cases, if the plaintiff proved the representations of fact to have been made by the defendant as of his own knowledge, with intent to induce the plaintiff to rely and act upon confidence in his assertions, and that the statements were untrue, it would not be necessary for him to go further and prove that the defendant knew them to be untrue when he made them. The allegation to that effect in the declaration not being descriptive, the plaintiff might rely upon proof of such other allegations as, without this, would constitute the substantial cause of action sued for. If he does so, and the evidence offered by him, and the conduct of the case is confined to the narrower ground of liability, all evidence of opinion of the defendant, or reasonable cause of belief that the statements made by him were true, become immaterial and irrelevant. When offered by the defendant it should be admitted or excluded according as to the presentation of the case appears to involve a question of wilful purpose to deceive or otherwise. In determining this, much depends upon and must be left to the good sense and sound discretion of the judge who presides at the trial, and to his better appreciation of what passes before him. The declaration alleges that the defendant, when making the statements, well knew that they were untrue. If that charge is kept before the minds of the jury while the plaintiff is putting in his case, it would be unfair to permit him, by merely disclaiming it as constituting any part of the legal ground upon which he seeks to recover, to exclude the defendant from counteracting the effect of evidence or suggestions in that direction. When in deciding, *in banc*, upon the propriety of admitting or excluding evidence offered apparently forsuch purpose, or which would be competent for such purpose, we are bound to presume that the judge at the trial exercised his discretion reasonably and properly in view of the course of the trial, and that instructions, adapted to the form of the real issue and the state of the evidence before them, were given to the jury. In the absence of anything to the contrary being made to appear by the bill of exceptions, the ruling of the judge at the trial, whether admitting or excluding such evidence, will be sustained; because, being competent within the issue as made by the pleadings, its admission may properly be determined by its relevancy as indicated by the course of the trial and the conduct of the case on the part of the plaintiff.

Without departing from or qualifying the principle adopted in Fisher v. Mellen, but in strict accordance therewith, we think the exceptions in this case must also be OVERRULED.

Recognizances in Criminal Cases.

UNITED STATES v. HIRAM GEORGE *ET AL.*

United States Circuit Court, District of Minnesota, October Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Declaration on Forfeited Recognizance—Amendments of.**—Leave by the trial court to the plaintiff to *amend his declaration* upon a forfeited recognizance given in a criminal proceeding, held not to be erroneous.

2. **Requisites of Recognizance—Description of Offence.**—Where a recognizance contains the usual provision that the party shall appear to answer to a particular charge "and not depart said court without leave thereof," *it seems* not to be essential to its validity that it shall on its face describe the particular offence of which the party is accused.

3. **The Recognizance in suit** held to describe the particular offence with sufficient certainty.

4. **Declaration upon forfeited Recognizance—Averment.**—In a proceeding upon a recognizance by declaration instead of *scire facias*, it is not necessary, where the officer taking it has jurisdiction over cases of the general description named in the recognizance, to aver the existence of the particular facts which establish that the officer had authority to take it. [Following People v. Kane, 4 Denio, 530, and State v. Grant, 10 Minn. 39.]

Writ of error to the district court: The action in the district court was upon a recognizance entered into by the plaintiffs in error as the sureties of one Hiram George, in the sum of $5,000, before I. N. Cardozo, Esq., a commissioner for the Circuit Court for the District of Minnesota.

The *condition* of the recognizance appears in the following opinion of NELSON, J., in the district court, on demurrer to the petition:

"NELSON, J.—This action is brought on a recognizance entered into before a commissioner of the United States Circuit Court, by which Hiram George, as principal, William H. Grant and Francis X. Brosseau, acknowledge that they owe the United States five thousand dollars upon the condition 'that the said Hiram George shall be and appear at the District Court of the United States, to be holden at Winona, in said district, on the first Monday of June, A. D. 1869, to answer to such matters and things as shall be objected to him on behalf of the United States, for unlawfully, falsely and deceitfully uttering and publishing as true, certain false, forged and counterfeited writings, for the purpose of defrauding the United States, then and there knowing the same to be false, forged, and counterfeited, and not depart said court without leave thereof,' etc.

"It is alleged in the declaration that the recognizance was filed for record, and that at the June term of the court, 1869, on the first day thereof, the defendant was called to appear, but that he failed to do so, and a default was entered against all of the parties.

"A demurrer was filed by the defendants. The point presented by the demurrer, and relied upon by the counsel for the defendants is, that no offence is charged in the recognizance over which this court can take jurisdiction.

"The statute (U. S. Stats. vol. 14, page 12), enacts 'that if any person or persons shall utter and publish as true, any false, forged, altered, or counterfeited bond, bill * * * * or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered or counterfeited, every such person shall be deemed guilty of a felony, and shall be punished,' etc.

"The commissioner in the recognizance has followed the language of the statute without particularly setting forth the kind of writing with which the accused intended to defraud the government.

The intent being the gravamen of the charge, and a necessary ingredient of the crime, the authority of the commissioner to act is apparent from the instrument; the offence is set forth with sufficient clearness to enable the accused to ascertain the principal charge he was expected to meet, and greater nicety in setting out the offence was, to say the least, discretionary; it was not required in the warrant of arrest, would have been unnecessary in the mittmus, and no good reason can be urged why it should be any more minutely described in the recognizance.

"In warrants of arrest some eminent criminal writers have claimed that it was unnecessary to set out the charge or offence at all, and none have deemed it necessary to set forth the offence alleged against the party with more than convenient certainty. The same rule would apply to the recognizance, and enough should be set out to show jurisdiction; no greater certainty is required. The case in 6th McLean, page 274, cited by the counsel for the defendant, is not inconsistent with the views laid down by us in regard to statutory offences. In that case the defendants entered into a recognizance upon the condition 'to answer a charge of willful and corrupt conspiracy for burning the steamboat Martha Washington, on the Mississippi river.'

"It was an offence against the laws of the United States to enter into a conspiracy to burn a steamboat with intent to injure certain underwriters. The court sustained the demurrer on the ground that no offence could be committed over which the federal courts had jurisdiction, unless the conspiracy to burn had been entered into with *intent* to injure the persons named in the act of Congress creating and defining the crime.

"The *intent* in the case before us is a necessary element of the offence, and is fully set forth in the recognizance. Without the allegation that the uttering and publishing as true, was with the fraudulent intent specified in the statute, no crime would have been set out. Any writing without reference to its character, when uttered and published with the intent specified in the act of Congress, will subject the party to a criminal prosecution under this statute (vol. 14 U. S. Stats., page 12). So, under the act of Congress considered by the court in 6th McLean, it was not the name of the steamboat that entered into the offence created by the statute, but the *intent* with which the conspiracy was entered into.

"Upon this view of the case I think the demurrer should be overruled, with leave to plead in twenty days."

On the overruling of this demurrer the defendants pleaded, that at the time of making the recognizance, the said Hiram George was unlawfully imprisoned by the said Cardozo, and others in collusion with him, in the common jail, and was there unlawfully kept and detained until the said recognizance was executed to procure the release of the principal from such wrongful imprisonment. Issue was taken on this plea, and the case was, by stipulation, tried by the court, who found that the bond was not procured in the manner pleaded, and gave judgment against the defendants for the amount of the recognizance.

To reverse this judgment the sureties in the recognizance prosecute this writ of error.

Masterson & Simons, for the plaintiffs in error; *Wm. W. Billson*, district attorney, for the United States.

DILLON, Circuit Judge.

1. The recognizance in this case was sought to be enforced by complaint on declaration and thereto the defendants first pleaded, in effect, *nul tiel record*, and on this plea the cause was tried before the court, and after its submission, the court "ordered that the plaintiff have until the first day of the next term to amend its complaint, and upon failing to do so that judgment be entered in favor of the defendants." The action of the court permitting the plaintiff to amend the declaration is assigned as error. The record does not state that any exception to this ruling of the court was taken, and there is nothing to show that the court improperly allowed the declaration to be amended.

2. An amended declaration having been filed, the defendants demurred thereto, substantially on the ground that no offence is stated in the recognizance, over which the court can take jurisdiction. The demurrer was overruled, and this ruling is now assigned as error. This objection assumes that it is essential to the validity of a recognizance, that it shall specify or describe the particular offence with which the principal cognizor is charged—a proposition which I do not decide, though I do not wish to be understood as conceding it to be sound. It is, perhaps, sufficient that the papers filed on the principal case or proceeding, and the entries of record therein, show that the recognizance is one taken by a competent court or officer in a proceeding properly commenced and within the jurisdiction of the tribunal or magistrate taking the obligation. State v. Randolph, 22 Mo. 474, and authorities cited.

The recognizance in suit contained, *inter alia*, a provision that the principal should "not depart said court without leave thereof," the effect of which, according to Hawkins (Pleas Crown, b. 2 c. 15, sec. 84), whose language is approved in the case last cited, is that the party shall not only appear and answer the particular charge, but also "be forthcoming and ready to answer to any other information exhibited against him while he continued not discharged." See also People v. Stager, 10 Wend. 431; Champlain v. People, 2 Comst. 82.

I believe there are cases in this country holding that such a provision does not dispense with the necessity of the recognizance describing the particular charge for which the party is to answer, but I do not care to enter upon this enquiry, because, conceding for the purposes of this case, that the special offence must be described in the recognizance, my judgment is that in the case before me it is described with sufficient certainty. The reasons for this view are very satisfactorily stated in the opinion of the district judge in whose conclusion I fully concur, and whose judgment will be found supported by the following cases: State v. Randolph, *supra*; State v. Rogers ("horse stealing"), 36 Mo., 138; State v. Marshall ("seduction"), 21 Iowa, 144; Besimer v. People, 15 Ill. 439; Browder v. State, 9 Ala. 58; Hall v. State, 9 Ala. 827; Commonwealth v. Nye, 7 Gray, 316; People v. Blankman. 17 Wendell, 252; State Treasurer v. Bishop, 39 Vt. 353.

3. The next assignment of error is, that the recognizance on its face, or in connection with the facts stated in the declaration, does not show that the commissioner had any jurisdiction or authority to take it. And in argument it is insisted that it does not appear by the recognizance, or such parts of the record as are before the court, that the offence was committed by George within the district, or where committed, etc., etc.

It is not necessary that these circumstances should be shown on the face of the recognizance. In New York, where the proceeding is by declaration instead of *scire facias*, it has been expressly decided that in such a declaration it is not necessary to aver the special facts by which the officer had authority to take the recognizance in the particular case. People v. Kane, 4 Denio, 530; Champlain v. People, 2 Comst. 82; and these cases have been expressly approved by the Supreme Court of Minnesota as applicable to the proceedings in this state as to admitting offenders to bail. State v. Grant, 10 Minn. 39, 47; United States v. Rundlett, 2 Curtis C. C. 41; United States v. Horton's Sureties, 2 Dillon C. C. 94; Furgison v. State, 4 G. Greene (Iowa), 302.

As none of the assignments of error are well taken, the judgment of the district court must be

AFFIRMED.

—IT is not generally known that the late Gerrit Smith was a lawyer. He had always paid great attention to legal studies, and late in life he applied for admission to the bar, that he might defend a poor and friendless German who had been indicted for murder. He was admitted to practice by the supreme court, and defended his poor client with great ability, securing his acquittal. Once afterward Mr. Smith appeared at the bar—this time to secure the discharge of a recaptured runaway; but in this he was unsuccessful, as were many greater lawyers who made the like attempt.

Railway Negligence—Liability for Injuries Caused by Disorderly Passengers.

PITTSBURGH AND CONNELSVILLE RAILROAD COMPANY v. PILLOW.

Supreme Court of Pennsylvania, January 4, 1875.

The plaintiff below lost an eye, through the quarrel of a couple of drunken men, on a car in which he was a passenger. *Held*, that the company was liable, as it was the clear duty of its employees to repress all disorderly conduct in their cars.

Error to the Common Pleas of Allegheny county.

[The facts of this case are not given in the Legal Gazette, to which journal we are indebted for it; but the importance of the general doctrine enforced in the opinion of the court, warrants us in publishing it in full.—ED. C. L. J.]

Opinion of the court by GORDON, J.

Upon a careful examination of the plaintiff's points, we find them supported by the most ample authority, and hence conclude that the rulings of the court upon those points are throughout correct. In the case of Meier v. The Pennsylvania Railroad Co, 14 P. F. S. 225, Justice Agnew quotes approvingly the language of Judge Bell, in Laing v. Colder, 8 Barr, 482, wherein he says, speaking of the duties which common carriers owe to the passengers whom they carry: "But though, in legal contemplation, they do not warrant the absolute safety of their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence or foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages." It is said further in the same case: "*Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it.

"This is the rule when the injury is caused by a defect in the road, cars or machinery, or by a want of diligence or care in those employed; or by any other thing which the company can and ought to control, as a part of its duty to carry passengers safely, but this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility, by showing that the injury arose from an accident which the *utmost skill, foresight and diligence could not prevent.*"

We cannot perceive the force of the argument of the counsel for the plaintiff in error, wherein he endeavors to raise a distinction between accidents arising from negligence in the equipment or management of the train, and those arising from the misconduct of passengers upon it. If the employees of the road had no control or power over passengers, this argument would be sound. But they have such power, and they are just as responsible for its proper exercise as they are for the proper running of the train. That it should be so is most fully and forcibly exemplified in the present case.

The plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the cars, or if so permitted, should have been so guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls. The duties and powers of conductors are very clearly pointed out by Justice Woodward in the case of Hines v. The Railroad Co., 3 P. F. Smith, 512, in which he says: "They may stop their trains and call to their assistance, for the purpose of suppressing riotous conduct on board thereof, not only all the employees, but also all passengers that are willing to lend a helping hand, and until the utmost effort has been made for that purpose, the responsibility of the companies, which they represent, for damage sustained by orderly passengers, remains."

We have a similar ruling in the case of Flint v. Norwich & New York Transportation Co., 34 Conn. 554, in which it is held that it is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and that persons guilty of rude or profane conduct should be at once expelled. Such is the doctrine of the books. It is wise and good, and necessary for the protection and comfort of those who travel upon our railway lines, and who, from the very character of the means used for their transportation, are, during such transportation, almost wholly dependent upon the railway officials for their safety and well-being.

JUDGMENT AFFIRMED.

Correspondence.

BROWN V. LEVEE COMMISSIONERS—A CORRECTION.

JACKSON, MISS., Jan. 22, 1875.

EDITORS CENTRAL LAW JOURNAL:—Your observations in the CENTRAL LAW JOURNAL of the 15th of January, 1875, suggested by the opinion of the Supreme Court of Mississippi, in the case of Brown v. Levee Commissioners, arose out of a misconception of the case, referable to the fact that a sufficient statement of it did not accompany the opinion.

It was not, as you supposed, a proceeding to sell lands for non-payment of taxes. But as the levee commissioners were already the owners of the lands, claiming title by purchase at tax-collector's sales theretofore made, the special statute (declared in the opinion to be unconstitutional), authorized the particular proceeding against the original owners, and all others claiming interest, so as to conclude them by the decree, and so that a good title would pass to the purchaser. The lands bought in for taxes by the levee commissioners were not (so long as held by them), subject to levee, state or county taxes. Taxes would have accrued, from the date of the purchase, if the lands had been subject to such taxes.

The Supreme Court of Mississippi is in accord with the authorities quoted by you in your criticism, "that property may be sold by summary proceedings for the non-payment of taxes." In the case of Griffin v. Dogan & Martin, 48 Miss. Rep. 20, the summary process of collection by distress and sale was upheld and vindicated as not offending the constitutional provision, "No person shall be deprived of life, liberty or property except by due course of law." Such practice was said to have been adopted in the states generally, and that "it would be impossible to keep in existence the ramified and extensive machinery of state governments, ueless the public revenues could be collected by some speedy, summary process." (The opinion in this case was delivered by the same judge who delivered the opinion in the case under consideration.)

If the entire opinion had been sent you the misconception of the actual case, to which the principles discussed by the court applied, could not have occurred. LEX.

Some Recent Decisions in Bankruptcy.

BANKRUPT LAW CONSTITUTIONAL—RAILROADS SUBJECT TO IT.

In the matter of the California Pacific R. R. Co. (U. S. D. C. D. of Cal.) Hoffman, J., determines that the bankrupt law is not unconstitutional because it attemps to subject to its operations, persons other than "merchants and traders," (citing *In re* Silverman, 1 Sawyer R. 410; S. C. 4 B. R. 173; and *In re* Reiman *et al.* 11 B. R. 21); nor so far as it applies to corporations, because it denies them the right to obtain a discharge in any case; that railroads are comprehended within the words "moneyed business or commercial corporations" contained in the act (citing Winter v. The I. M. and N. P. R. R. Co., 7 N. B. R. 291), and proceeds as follows:

SECURED CREDITOR HAS A PROVABLE DEBT UNDER § 39 FOR AMOUNT OF CLAIM OVER VALUE OF SECURITY—*In re* FROST OVERRULED—COURT HAS JURISDICTION TO DETERMINE VALUE OF SECURITY.

It is further objected that the debts due the petitioning creditors, being *secured* debts, are not "provable" within the meaning of the 39th section of the act.

This objection is founded on the language of the 20th section.

That section provides in substance that a creditor whose debt is secured by mortgage or other lien, on the bankrupt's property, "shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court may direct; or the creditor may release and convey his claim to the assignee upon such property, and be admitted to prove his whole debt." * * * "If the property be not so sold, or released and delivered up, the creditor *shall not be allowed to prove any part of his debt.*"

It is urged that by this section the secured creditor is not allowed to prove his debt until the value of the security is ascertained, in the manner prescribed by the act, unless he surrenders his security—and that this value can only be ascertained after adjudication and the appointment of an assignee; until then he has no "provable debt."

But, to ascertain the true meaning of this section, other provisions must be resorted to.

Section twenty-two provides that every creditor desiring to be admitted to share in the estate of the bankrupt, by virtue of a debt owing to him from the bankrupt, must exhibit his demand in a deposition setting forth the consideration thereof, "and whether any and what *securities are held therefor.*"

In form twenty-one, the mode in which "*proof of debt with security*" shall be made, is specially prescribed by the supreme court. By this form the creditor is required to set forth "a particular description of the debt, and also of the property held as security, and the estimated value of such property."

It is apparent from these provisions that the secured creditor not only may, but must prove his debt before he can be recognized as a creditor, with or without security.

Upon the proof so made a hearing may be had, testimony taken and an adjudication made. That adjudication, if in favor of the creditor, will establish the fact and amount of the bankrupt's indebtedness to him, and the further fact that he has a valid lien on the property claimed as security.

The *value* of that security is to be ascertained subsequently, as provided in section twenty.

It has accordingly been held, where a secured creditor applied to the Court for an order for the sale of the security held by him, that such order would be withheld until he had proved his debt under the 22d section and established the existence of the debt, and that the property claimed as security was in fact pledged to him. In the matter of G. Bigelow, 1 B. R. 186.

Construing, then, the 20th and 22d sections together, the meaning of the former becomes clear and unmistakable.

"As used in that section, the word 'debt' means *the amount upon which the dividend is to be computed*, and the phrase 'prove his debt' is equivalent to the phrase 'share in the distribution of assets.'" Per Mr. J. Benedict (ib).

This construction of the 20th and 22d sections of the act given by Mr. J. Benedict, in the case above cited and which is the leading case on the subject, has been adopted by the courts with almost entire unanimity.

In *in re* Stansell, 6 B. R. 184, Emmons, Circuit Judge, says: "I concur fully in the interpretation which reads section 22 and forms 21 and 25, as requiring *all creditors*, secured and unsecured, alike to prove their claims, and which construes the last clause of section 20, prohibiting the proof of any part of the secured claim to mean only that the creditor shall not be admitted to share in the assets except for the just balance beyond his security." And for this the learned judge cites a very large number of authorities, and quotes with approval the language of Dillon, Circuit Judge, to the effect that "the debt of a mortgagee *is provable*, and such proof, does not waive his lien."

The only adverse decision which has been referred to, is that of Mr. J. Blodgett (*In re* Frost, Chicago Leg. News, Oct. 31st, 1874).

In that case, the learned judge holds that by "debts provable under the act," Congress meant debts *unconditionally* provable.

For this position he cites no authority; nor does he refer to any one of the numerous cases I have mentioned above.

He seems to have been led to the conclusion he adopts by the desire to frustrate any collusion between the debtor and a sufficient number of his secured creditors to prevent the unsecured creditors from obtaining the requisite number and values to enable them to file a petition.

But any debtor who can secure the co-operation of more than three-fourths in number, or two-thirds in value, of his creditors, may put it out of the power of the remainder to procure his adjudication. By the provisions of the ac they have an absolute veto on the proceeding. The exclusion of the secured creditors from the computation may, in some cases, mitigate the evil (if it be one); but it will be merely a palliative and not a preventive.

Nor will the practical operations of the rule laid down by the learned judge be found entirely satisfactory.

The enormous proportions which the indebtedness of railroad corporations has assumed in this country, is well-known. It exists almost universally in the form of bonds secured by mortgages on the roads.

Where, as must often be the case, the indebtedness so secured exceeds the value of the road, the mortgagees are virtually its owners. It may be for their interest, and they may unanimously desire to allow the companies to continue in the possession of the road, and to look to an increase of population and the development of the country for their ultimate reimbursement. But if secured debts are not "provable" debts, and the bondholders are excluded from either side of the computation, it will be in the power of one-fourth in number and one-third in value of the creditors to whom the floating debts of the company are due, to put it into bankruptcy, and this when the total floating debt may be insignificant in amount compared with the debts due to the bondholders. It appears to me that in deciding so vital a question the bondholders should have a voice proportioned to their interests.

But whatever be the force of this suggestion, I think it clear, from the language of the 22d section and forms 21 and 25, and from the overwhelming weight of authority, that a secured creditor must be deemed to have a "*provable*" debt within the meaning of the 39th section of the act.

The question then arises: To what amount is the secured debt to be deemed provable? In replying to this question one of two alternatives must be adopted. The debt must either be reckoned at its full amount, irrespective of the value of the security, or else at that amount *less* the value of the security.

But it is apparent that it would be as unjust and as absurd to allow a creditor, who is fully secured and who may be considered as virtually paid, inasmuch as he holds in his hands the means of payment, to control a proceeding which has for its object the prevention of frauds by the bankrupt in respect of his *other* property, and its equal distribution amongst his *other* creditors, as it would be in the contrary case to deny to the creditor, whose security is little more than nominal, and who looks to the general assets for the payment of the greater part of his debt, any voice in the matter.

Reason and justice seem to require that the rights of each should be proportionate to his interests involved, and that the amount at which the debt of every secured creditor is to be reckoned should be ascertained by first deducting the value of the security.

But it is objected that this mode of ascertaining the amount of the debt is impracticable, for no power is given to the court to determine the value of the security for such a purpose and at this stage of the proceeding.

I admit that for the purpose of ascertaining for what amount the secured creditor shall share in the distribution of general assets, or in the language of section 27, for what amount his debt shall be considered "proved and allowed," the provisions of the 20th section must be resorted to.

But it does not follow that for the purpose of ascertaining whether creditors to the requsite amount have joined in the petition, the court may not provisionally make the necessary enquiry.

That the court was not deemed by Congress incompetent to make it, is shown by the provisions of the 43d section, in relation to "composition with creditors." That section provides that "the value of the debts of secured creditors *above the amount of such security, to be determined by the court*, shall, as nearly as the circumstances shall admit, be estimated in the same way.

The powers conferred upon the district courts by the bankrupt act are of the most comprehensive character.

Section 1st provides "that the several district courts of the Untited States be, and they hereby are, constituted *courts of bankruptcy*, and they shall have original jurisdiction, in their respective districts, in all matters and proceedings in bankruptcy, and are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * * * *

"And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to *all acts, matters and things* to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

By the second section, jurisdiction, concurrently with the circuit courts is given, "of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

It was evidently the intention of Congress to establish a complete system o

bankruptcy proceedings, and to confer upon the "courts of bankruptcy" constituted by the act, plenary jurisdiction over the whole subject and extending to "all matters, acts and things to be done under and in virtue of the bankruptcy."

In the exercise of this jurisdiction these courts have the authority to do every act necessary and proper to carry into effect the policy and purposes of the law.

The strict rules of construction which are applied in cases where a special statute gives to a court power to do a particular thing, such as to open streets, to condemn property, to determine contested elections and the like, and which prescribes the precise mode in which the power shall be executed, have no application to a case like the present, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose.

On this point we are not without authorities to guide us. The district courts have, in numerous instances, issued injunctions against secured creditors seeking to enforce their security by foreclosure in the state courts, or by a sale under a power contained in the mortgage, or by a trustee appointed in a trust deed. See Markson *et al.* v. Heany, 4 B. R. 165, and cases cited. Phelps v. Sellick, 8 B. R. 390.

And yet no power to issue injunctions in this class of cases is expressly conferred by the act.

In the case of *In re* Alexander (4 B. R. 45), the point under consideration was expressly decided.

The question was made whether the debt due a secured petitioning creditor amounted to $250 in value. It was objected that, until an assignee was appointed the value of the security could not be legally ascertained. But the court (per Mr. J. Lowell) held that this was too strict and literal a construction of the statute, and that it might enquire into the value of the security in order to ascertain what was the amount of indebtedness practically unsecured. "This," the court observes, "will be a question of fact like any other, and no more difficult to decide than such as often arise."

So where it was claimed that the alleged bankrupt had counter-claims against the petitioning creditor, which would reduce the amount of the debt due below $250, the court proceeded to enquire into the validity and amount of the counter-claims, notwithstanding that such an enquiry involved an assessment of unliquidated damages. *In re* Osage V. & So. Kansas R. R. Co., 9 B. R., p. 281.

For these reasons and on these authorities I conclude that the court has authority to enquire into and determine what is the value of the securities held by the creditors of the alleged bankrupt, in order to ascertain whether the claims of the petitioning creditor are of the amount required by the statute.

JURISDICTION OVER CORPORATIONS—PRACTICE.

The remainder of the opinion over-rules the objection that district courts can acquire no jurisdiction over corporations, because the bankrupt act provides no mode of serving the petition and order to show cause, upon a corporation; determines that it is not necessary for the agent of the petitioning creditors to set forth his authority in the petition. It appearing from the papers in the cause, that the requisite amount and number of creditors had not signed the petition, ten days further time was given, that other creditors might join.

The full text of above opinion will appear in 11 National Bankrupt Register. We are indebted for a printed copy of it to the courtesy of Mr. Circuit Judge Sawyer.

HOMESTEAD—SURRENDER OF PREFERENCE.

In re Detroit (U. S. D. C. W. D. Mo., Jan., 1875), Krekel, J., follows Cox v. Wilder, 2 Dill. citing Vogler v. Montgomery, 54 Mo. 577. A creditor, holding a deed of trust upon the homestead of the bankrupt, executed within four months prior to bankruptcy, claimed by the assignee to be a preference, files a consent that all creditors may share in the property; such consent held to be a surrender of the preference within § 23, and proceeds of sale of the property, $725, set apart to the bankrupt in lieu of his homestead.

Inasmuch as the Missouri homestead exemption in this case amounted in value to $1500, if the property in question was worth but $725 (the price at which it was sold under the deed of trust, the assignee joining), the question arises how a deed of trust upon the property, no matter when given, could be deemed a preference. The assignee could have had no interest in the property, had no deed of trust been executed, unless the bankrupt saw fit to surrender his homestead. He did not surrender his homestead, and, so far as appears, the creditor's forced surrender of his security benefited no one but the bankrupt. Had the creditor retained his security, so much of the bankrupt's debts would have been extinguished. As the matter stands, the provable debts against the estate are increased $725, and the assets of the estate actually lessened by the amount of costs incurred by the assignee.

DISCHARGE—RESTRAINING PROCEEDINGS AT LAW—JURISDICTION.

In re William Archenbrown (U. S. D. C. E. D. Mich., Nov. 1874; 11 N. B. R. 149), Longyear, J., the following points were determined:

1. In any case where a discharge may be a bar to a debt, claim, liability, or demand against a bankrupt, a suit at law to collect the same, must be restrained until the application for a discharge, if made and prosecuted with reasonable diligence, has been determined. If the creditor would avoid such bar he must come into the bankruptcy court and oppose a discharge in the modes pointed out by the act.

2. Any debt, etc., which "might have been proved," whether actually proved or not, comes clearly within the category of debts, etc., as to which a discharge is declared by section 34 to be a release, even though the creditor owning such debt, etc., was omitted from the schedule, and received no notice of the proceedings.

3. Jurisdiction, either of the proceedings or to grant a discharge, is not made to depend upon the correctness of the schedule of creditors, or upon the actual reception of notice of the proceedings by creditors. The court obtains full and complete jurisdiction for all purposes whatsoever, by the petition, whether voluntary or involuntary, adjudication, and warrant. E. T. A.

Notes and Queries.

HOMESTEADS IN THE PUBLIC DOMAIN.

A correspondent writing from Marysville, Kansas, sends us the following statement of a case decided in the Supreme Court of California, and states that the same principle is pending before the Supreme Court of Kansas, in the case of Watson v. Voorhees, submitted on November 10th:

"The Supreme Court of California has decided, in the case of Miller v. Little, that a federal homestead cannot be sold under execution for a debt contracted before the date of a patent. The federal law makes a provision for exemption from such debts, and the supreme court decided, McKinstry dissenting from the other four justices, that the exemption is valid. People who now trust men occupying federal homestead claims, before the patent issues, must not rely on the land for payment. Not even a mortgage would be valid. A debt incurred after the date of the patent may take the land. These remarks apply only to federal homestead claims; state homesteads are entirely different in their origin and rights."

For the information of our readers, we give below the text of the California decision referred to:

[Miller v. Little, 47 Cal. 348, Supreme Court of California, January term, 1874.] "Appeal from the district Court of the Seventh Judicial District, Solano County. Action to restrain the sale of land under execution. The defendant, Anderson, having initiated a homestead claim under the laws of the United States, in 1863, subsequently perfected it, and received a patent in June, 1869. Prior to the issuance of the patent, and pending the proceedings, he became indebted to defendant, Little, upon a promissory note. Subsequently, an action was brought upon the note, and a judgment was rendered against him, January 19th, 1871. The plaintiff purchased the premises from Anderson, in February, 1871, and afterwards brought this action to enjoin the sale. The plaintiff had judgment and the defendants appealed.

"By the court, Crockett, J.—By the fourth section of the homestead act of the United States, approved May 20th, 1862 (12 Statutes at Large, 392), it is provided that 'no lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

"The only question presented on this appeal, is, whether a homestead claim perfected by a patent under the act of Congress, and afterward conveyed by the patentee to another person, is exempt from execution and sale for a debt

contracted by the patentee prior to the issuing of the patent, and which had been reduced to judgment before the conveyance.

"The theory of defendants is, that after the patent issues and the title has fully vested in the patentee, the power of the federal government over the land has ceased, and Congress has no authority to exempt it from execution for antecedent debts. If this theory be sound, Congress has made an abortive effort to protect from seizure and sale, for antecedent debts, homesteads granted to actual settlers on the public lands. But we think it is not sound. Under the federal constitution, Congress is vested with the exclusive power to manage and dispose of the public lands. It may dispose of them in such a manner, on such terms and conditions, and subject to such restrictions and limitations as in its judgment will best promote the public welfare. In furtherance of what is deemed a wise policy, tending to encourage settlement, and to develop the resources of the country, it invites the heads of families to occupy small parcels of the public land, and agrees with them that if they will reside upon the land for the period of five years, they shall receive the title in fee, discharged of all debts of this character, before then contracted. To deny to Congress the power to make a valid and effective contract of this character with the homestead claimant, would materially abridge its power of disposal, and seriously interfere with a favorite policy of the government, which fosters measures tending to a distribution of the lands to actual settlers at a nominal price.

"Judgment affirmed. Remittitur forthwith. Mr. Justice McKinstry dissented."

In Nycum v. McAllister, 33 Iowa, 374, it was held that the provision in § 4 of the federal homestead act of May 20, 1862, which provides that "no lands, acquired under the provisions of this act, shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent," was not designed to disable the settler from mortgaging his interest in the premises before the issuing of the patent. In this case the right of the mortgagor to a patent was perfected, he having resided on the premises more than five years.

Briefs.

[Members of the profession who send us briefs for notice will confer a great favor by giving their *address*, and by enclosing a brief statement of the points argued. This will save us much labor, avoid the danger of our making mistakes, and render it possible for us to notice briefs when we might not otherwise have time to do so.—Ed. C. L. J.]

Duties of Trustees—Fraudulent Judgments.—Kitchen *et al.* v. The St. Louis, Kansas City and Northern Railway Company *et al.* In the Circuit Court of St. Louis County, Room 5. Argument of John D. Pope, of Kitchen, Pope & McGinnis, December 22d, and 23d, 1874. pp. 79. The history of this case exhibits a sort of Credit Mobilier transaction by which the North Missouri Railroad, which cost some twenty-one millions of dollars, was sold out and got into the hands of another company for about two millions. "Stealing a railroad" is an expression which has been coined within the last few years. If the facts stated and positions taken in this argument be correct, this is an instance where it was done. The facts are thus stated:

"This action is brought by certain persons claiming to be stockholders of the North Missouri Railroad Company. The chief object of the suit is to obtain a decree of court declaring what is known as the "St. Louis, Kansas City and Northern Railway," and its appurtenances, to be the property of the North Missouri Railroad Company. This property is now held by the St. Louis, Kansas City and Northern Railway Company, under two conveyances, both of which plaintiffs claim are fraudulent.

"The first conveyance is a deed made by Solon Humphreys and Henry F. Vail, as trustees in a deed of trust, executed to secure the $4.000,000 second mortgage bonds of the North Missouri Railroad Company. It is alleged that the second mortgage was illegal chiefly because it was made by the directors in favor of a secret unincorporated association called the "St. Louis and North Missouri Company," in which company several of the directors were partners; and also because the purchaser, at the trustees' sale, was "The Illinois, Missouri and Kansas Association," another secret unincorporated company, in which nearly all the directors, as well as both the trustees, were partners. The deed of the trustees was executed to "M. K. Jesup, trustee," and bears date August 26, 1871. On the 6th of February, 1872, M. K. Jesup, without consideration, conveyed the same property, deeded to him by the trustees—his partners in the purchase—to the St. Louis, Kansas City and Northern Railway Company, which had been incorporated in furtherance of the purposes of the directors and trustees to acquire the ownership of the North Missouri Railroad.

"The second conveyance is a deed made by the United States marshal, dated September the 21st, 1872, and purporting to convey to the St. Louis, Kansas City and Northern Railway Company, all the property and franchises of the North Missouri Railroad Company, in consideration of $45,000. The marshal's sale was made under a decree in chancery, rendered in the United States Circuit Court for the Eastern District of Missouri. The decree was obtained in favor of William Hoge, in a cause wherein he was complainant, and the North Missouri Railroad Company, James Low, George D. Humphreys, and others, were defendants. All the parties except the North Missouri Railroad Company claimed to be judgment-creditors of that company, and were consenting to the decree. The marshal's deed, under this decree, is alleged to be fraudulent, on the grounds that the judgment-creditors named in the decree were not creditors at all of the North Missouri Railroad Company, but all the judgments held by them were obtained by the Illinois, Missouri and Kansas Association, in the names of the plaintiffs of record—the claims sued on being in fact held and owned by that association — and that therefore all of said judgments, as well as the decree to sell the property and franchises of the North Missouri Railroad Company, were obtained for the benefit of the directors of the North Missouri Railroad Company, and of the trustees, Humphreys and Vail, and their partners, all of whom were forbidden to sue the North Missouri Railroad Company; that said judgments and decree were obtained by collusion, and through fraud on the court; that all competition at the marshal's sale was forestalled; and that the purchasers were really, though not avowedly, the directors of the North Missouri Railroad Company, and the trustees, Humphreys and Vail, and their partners in all of said illegal transactions." Particular reference to other facts in evidence is made somewhere in the argument.

This is an argument of great value on the power of the directors of corporations to contract with another firm or company, of which they themselves are members—in other words, upon the power of a trustee to be at the same time the buyer and seller. [Address John D. Pope, Esq., St. Louis, Mo.]

Summary of our Legal Exchanges.

ADVANCE SHEETS OF 24 OHIO STATE REPORTS (CINCINATI, ROBERT CLARK & CO).

Devise—"Issue," when a Word of Limitation—Limitation over—Estates Tail—Disclaimer.—Harkness v. Corning. [24 Ohio St. 416.]

1. A testator devised certain real estate to his granddaughter S. and her issue—*habendum*, to S. "and her issue and their heirs." If S. should die before the age of twenty-one years, leaving no issue then living, there was a devise over of the premises to two daughters of the testator for their lives, and upon their decease to their issue respectively. S. had no issue, but died after she became twenty-one years of age. *Held*, 1. That issue, as used in connection with the devise to S., was a word of limitation, and not of purchase, and that S. took an estate in fee tail; 2. That although S. died without issue, yet as her death did not occur until after she became twenty-one years of age, the devise over to the daughters never took effect.

2. The statute to restrict the entailment of real estate (S. & C. 550), does not change the nature of the estate in the first donee in tail, from an inheritable estate to an estate for life merely. The object of the statute is to restrict the entailment to the immediate issue of such donee, and, on the determination of his interest in the estate, and of such rights as the law annexed to it while held by him, to enlarge the estate tail in the hands of such issue into an absolute estate in fee simple.

3. One of the incidents of an estate in fee tail, at common law, is the right of the surviving husband to an estate by curtesy, with which the statute above referred to does not interfere, and to which, in this state, the husband is entitled, whether there is issue born during the coverture or not.

4. In an action for the recovery of real property, a disclaimer by the defendant, in his answer, of any possession of the property in question, or of any right therein, otherwise than as tenant of a third party named, whose title he sets forth, constitutes no defence, unless such title is a good one; and where the parties proceed to final judgment without bringing in such party, the omission affords no grounds for reversing the judgment.

Advancements — Suits by Judgment-Creditors — Conclusiveness of their Judgments.—Swihart v. Shaum. [24 Ohio St. 432.]

1. A person indebted conveys his property, by way of gift or advancement, among his children. His two sons, in part consideration of the portion conveyed to them, agreed to pay his debts. In a suit by a judgment-creditor, whose debts accrue before the division, to subject the lands so conveyed to the payment of his judgment, the land conveyed to the sons ought to be first subjected.

2. In such suit the judgment, in the absence of fraud or collusion in obtaining it, is conclusive evidence both as to the fact and the amount of indebtedness, not only as between the parties to the judgment, but as between and against the parties to whom the judgment-debtor had conveyed the property sought to be subjected to its payment; and this conclusive effect of the

judgment is not affected by the fact that it was recovered after the conveyance of the property.

WASHINGTON LAW REPORTER, JAN. 12.

Homesteads in Public Domain.—Burt v. Dopp, decided by Hon. Columbus Delano, Secretary of the Interior. [2 Wash. L. R. 3.] The time a homestead claimant was in the United States military service in the late rebellion should be taken as a part of the five years in which a contest under the 5th section of the homestead act could be commenced, and if such period, when added to the time of actual residence and cultivation, was more than five years before the contest commenced, the contest should be dismissed.

Homesteads in Public Domain—Contests—Procedure—Widow's Homestead occupied by Married Son.—Jones v. Roberts, decided by Hon. Columbus Delano, Secretary of the Interior. [2 Wash. L. R. 3.] The decision of the commissioner in a contest from which no appeal was taken, becomes final between the parties as to all matters arising before the trial.

The plaintiff has a right to contest an entry in a new proceeding for abandonment or change of residence subsequent to the date of the former trials.

No other questions than those of abandonment or change of residence can in any case be considered.

A contestant who has been twice defeated should be held to a strict statement of his claim.

A statement that the homestead party (who is a widow) does not occupy the land claimed as a homestead, but that the same is occupied and used by her son (who is a married man), and who has the sole and undisputed control of the same, is held insufficient.

LEGAL GAZETTE (PHILADELPHIA, KING & BAIRD), JAN. 15.

Claims Against United States by Merchant who Made Advances on Cotton afterwards Captured.—United States v. Villalonga, Supreme Court of the United States, October term, 1874, opinion by Mr. Justice Strong. [7 Legal Gazette, 17.] 1. A factor who has made advances upon goods consigned to him, may be regarded in a limited sense, and to the extent of his advances, as an owner, but such ownership is never more than the ownership of a lien or charge upon the property.

2. Under the statutes of Georgia, he can recover only for the injury which his special property, namely his lien, has sustained. For all beyond that the general owner may sue. The property of that owner is not vested in the factor.

3. Under the act of Congress, in reference to captured and abandoned property, the claimant in this suit is entitled only to the net proceeds of his own cotton, and to the advances made by him upon other cotton in his possession, as factor at the time of seizure.

Injuries to Married Woman—Testimony of Wife in her own Behalf—Admissions by Agents.—Nothwestern Packet Co. v. Clough, Supreme Court of the United States, October term, 1874, opinion by Mr. Justice Strong. [7 Leg. Gaz. 18.] 1. The competency of a wife as a witness for herself, in an action against a packet company for damages resulting from a fall from the gangway, provided for entrance to a boat, being clear under the statutes of Wisconsin, this court is bound to follow the laws of that state.

2. The declarations of the captain of the boat, made two days after the occurrence, by which the injury resulted, are not admissible in evidence to bind the company. He is not such an agent as to be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers.

CHICAGO LEGAL NEWS, JAN. 16.

Right to Terminate Contract by Reason of the other Contracting Party being Disabled from Performing her Part Through the use of Opiates.—Lyon v. Pollard, Supreme Court of the United States, October term, 1874, opinion by Mr. Justice Miller. [7 Chi. Leg. News, 120.]

Lyon agreed to furnish the means of carrying on the St. Cloud hotel, and Mrs. Pollard agreed to superintend and conduct it. For this service she was to receive one-fifth of the net profits. Either party was at liberty to terminate the contract by giving thirty days notice in writing. The court held, in an action brought by Mrs. Pollard for a breach of the contract by Lyon, it was competent to show that Mrs. Pollard was unfit to perform her part of it by reason of the use of opiates, and of her unsound mental condition, and that the contract on her part implied some capability of performing the duties she had assumed of rendering some service; and if she could render none, that Lyon was not bound to continue even for thirty days, the time allowed for giving notice of terminating the contract.

[The above is another specimen of the trifling cases coming from the Supreme Court of the District of Columbia, which take up the precious time of the justices of the Supreme Court of the United States, while weighty and important business from all parts of the country is suffering delay.—Ed. C. L. J.]

Federal Taxation—Action on Distiller's Bond—Capacity Tax—Time During Which Distillery Could not be Operated to be Deducted—Erroneous Assessment not Appealed from, how far Res Adjudicata.—Clinkenbeard v. United States, Supreme Court of the United States, October term, 1874, opinion by Mr. Justice Miller, Clifford, Swayne, Davis and Strong, JJ., dissenting. [7 Chi. Leg. News, 129]. 1. In an action on a distiller's bond, where there had been a deficiency in the distiller's returns for a particular month, and where the declaration alleged as a breach that the distiller did not pay the tax assured upon the aggregate capacity of his distillery for the month in question, the defendants offered in evidence the distiller's tri-monthly returns, regularly made, on which he had paid the tax, and then offered to show that on the first four days for which taxes were assessed against him by said assessment of deficiency, he was unable to operate his distillery, because no store-keeper had been assigned by the government to said distillery; and that for four other days he had, by reason of unavoidable accident, been unable to operate said distillery; that he had given the required notice, and that the machinery, during said time, was securely fastened by an assistant assessor, and remained so, and that said four days were included in said assessment for deficiency: *Held*, that it was error to exclude this evidence. The learned Justice said: "The distiller, without any fault of his own, but by the omission of the government itself, was prevented from operating his distillery for the first four days for which he was taxed, and his distillery was inactive from an accident, and in charge of a government officer, as prescribed by law, for four other days. He could not, without a breach of law, commence distilling till a store-keeper was assigned him, and he acted in compliance with the law when his distillery was stopped by accident. To charge him with the capacity-tax during those eight days was unjust and oppressive."

2. In an action by the United States on a distiller's bond, the defendants may show that the tax, the non-payment of which is alleged as a breach, was illegally assessed; and they may do this notwithstanding the fact that the distiller has not appealed from the illegal assessment to the secretary of the treasury, and had an adjudication by that officer. The statute makes such an appeal and adjudication a condition precedent to the right merely to sue to recover back taxes erroneously or illegally assessed and collected. Upon this point the learned Justice said: "Is he precluded by any general rule of law from setting up such a defence? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or certiorari, for setting it aside? It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the government elects to resort to the aid of the courts it must abide by the legality of the tax. When it follows the statue its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs."

Negligence—Proximate and Remote Cause.—Toledo, Wabash and Western Railway Company v. Muthersbaugh, Supreme Court of Illinois, October 9, 1874, opinion by Craig, J. [7 Chig. Leg. News, 131]. Sparks from a locomotive set fire to a warehouse standing near the railway track and destroyed it. A stable stood one hundred and one rods from the warehouse and there were no intervening buildings. There being a high wind blowing at the time, from the direction of the burning warehouse, fire was communicated to the stable and it was consumed: *Held*, that the owner of the stable could not recover damages against the railroad company. The burning of the warehouse was not the proximate, but the remote cause of the burning of the stable. The court cite and follow Flint v. The Railroad Co., 59 Ill, 349. See also Metallic Compression Co. v. Fitchburg Railroad Co., 1 CENT. L. J. 212; Kellogg v. Railway Co., Ibid. 278.

Construction of Wills—When Real Estate as to which the Testator died Intestate will be sold for the Payment of a Legacy.—Heslop v. Gatton, Supreme Court of Illinois, October 9, 1874. [7 Chi. Leg. News, 132]. This case illustrates an arbitrary rule in the construction of wills by which the intention of testators is frequently defeated. This rule is, that when a person dies, leaving a will and personal and real property, his debts and pecuniary legacies, bequeathed by the will, are to be paid from his personal property, and in case of a deficiency of personal property, the legacies must abate, unless he charges his real estate with their payment. The following cases furnish illustrations of it: Reynolds v. Reynolds, 16 N. Y. 257; Harris v. Fly, 7 Paige, 421; Lupton v. Lupton, 2 Johns. Ch. 614; 2d

Redfield on Wills, 208; Stevens v. Gregg, 10 Gill and Johns. 143; Warren v. Davis, 2 Mylne and Keene, 49. Now Mrs. Clendennin, the testatrix in this case, probably did not understand this rule, and, what is worse, she probably called in a lawyer to write her will who did not understand it. Her personal estate consisted of some household furniture,a horse and buggy, and about three hundred dollars in money, and her real estate consisted of three town lots, worth about one thousand dollars. She had two daughters whom she evidently designed to cut off, for she took the popular mode of doing this, by giving them one dollar each. She then bequeathed to her sister, Mrs. Schooley, the sum of one thousand dollars, to be managed for her during her life; but did not provide how this legacy should be raised. She then gave to Helen C. Buracken, her grand-daughter, all her silverware, household furniture, and all else of personal property she might own at the time of her death, not otherwise devised by the will, excepting her horse, buggy and harness. She also provided for the payment of her lawful debts and funeral expenses.

Now, putting this and that together, what do we have? 1. Conclusive grounds, in the dollar legacies, for inferring an intent to cut off her daughters, who, as her heirs at law, would otherwise inherit the real estate. 2. A specific disposition of all her personal property, except enough to pay a few small debts, her funeral expenses, and the reasonable expenses of administration. 3. Nothing left, out of which to raise the thousand-dollar legacy but the real-estate, which she manifestly did *not* intend to permit to descend to her daughters, and that just sufficient for the purpose. And yet, out of these elements, the court deduced the following conclusion:

"The intention of the testatrix to charge her real estate with the payment of this legacy is not expressly declared by the will, nor is there anything in the language of the will from which such an intention can be fairly and satisfactorily inferred. It is argued that the testatrix did not intend that her real estate should go to her children, as she cut them off with a nominal legacy of one dollar each. But that was only as regarded the personal estate. The contrary intention, rather, is manifested by the omission to make any devise of the real estate, thus leaving it to go to her children, as it would do, according to the law of descent, in the absence of a devise of it.

"It is insisted that it was the intention of the testatrix that the legacy to Mrs. Schooley should be paid out of the proceeds of the real estate, as she knew that unless it was so paid it must fail; and the bill sets out the state of the property of the testatrix as affording evidence of such intention. The bill sets out that all the real estate, at the time of the execution of the will, and of her death, were three town lots of the value of about one thousand dollars; that at the time of the execution of the will, the testatrix owned no other personal property than the specific items therein mentioned in the third clause of the will, and about three hundred dollars in money; that her only income was derived from an interest in a life estate, determinable on her death, amounting to about $800 annually, which was covered by her annual expenses of living; that it was her intention to convert said real estate into money, and for that purpose, on the 10th day of October, 1870, she gave to the appellee, the executor, a power of attorney to sell the said lots, and convert the same into cash or notes, which power of attorney was never revoked, and remained unexecuted only because of inability to make a sale. Without advering to the force of such circumstances as evidence to show the intention to charge the real estate with the payment of the legacy, in case they were admissible for such purpose, we are clearly of opinion that such extrinsic evidence cannot be resorted to, to show what the testatrix intended under the rules of evidence applicable to the construction of wills. Generally a will is not to be construed by anything *dehors*, where there is no latent ambiguity, and parol evidence is not admissible to show the intention of the testator, against the construction on the face of the will, and the state of his property cannot be resorted to to explain the intention. Tole v. Hardy, 6 Cow. 333; Kurtz v. Hibner *et al.*, 55 Ill. 514. Bowen, Justice, in delivering the opinion of the court, in Reynolds v. Reynolds, *supra*, said: 'I find no case subjecting the real estate of a testator to the payment of legacies unless an intention to that effect was expressed in or fairly to be inferred from the terms of the will.' In the absence of any intention to that effect, expressed in or fairly to be inferred from the terms of the will, the legacy cannot be charged upon the real estate of the testatrix, and it must abate to the extent that the personalty has failed."

We will add nothing further, except to express our deliberate conviction that if this will had been submitted to a hundred business men, not acquainted with the rule of law above stated, selected at random on the exchange of St. Louis or Chicago, not three of them would have said that it was not the intention of the testatrix that the land should be sold to pay this legacy.

Railway Negligence—Contributory Negligence—Comparative Negligence.—Chicago and Alton R. R. Co. v. Mock, Supreme Court of Illinois, opinion by Sheldon, J. This case will be without value as a precedent unless the reporter makes a full statement of the facts proved, and sets out the instructions of the court below. The action is brought by Mrs. Mock to recover damages for the killing of her husband. The jury, in addition to a general verdict for the plaintiff, returned the following special finding: "Both parties were guilty of carelesness, but th. defendant guilty to a greater degree." The court say that the court below erred in failing to instruct the jury properly as to contributory negligence, and that this verdict evinces that they may have erred through not being properly instructed. "The general rule is," said the learned Judge who delivered the opinion, "that a plaintiff, who has been guilty of contributory negligence, cannot recover. This court has held that, where the negligence of the plaintiff is slight, and that of the defendant is gross, the former may recover. But it never has adopted any such rule of liability in cases of mutual negligence, as that of a greater degree of negligence on the part of the defendant. The second and fifth instructions were, further, too broad in allowing a recovery for negligence in general respects, without limitation to the particulars of negligence specified in the declaration."

Legal News and Notes.

—HORACE BINNEY, the Nestor of the Philadelphia bar, recently celebrated his 95th birthday. He is the only surviving alumnus of Harvard college who was graduated in the last century.

—THE assembly of New York has passed a bill authorizing the city court of Brooklyn to extend its term. This is owing to the probable prolongation of the Beecher trial over the January term. Judge and counsel in the case approved of the bill before it was sent to Albany.

—IN the Supreme Court of Maryland, in the case of The State against the Northern Central R. R. Co., to recover one-half of one per cent. of its gross receipts as state tax, involving a large amount, Judge Kibbon has given a decision against the state, declaring the tax arbitrary and greatly exceeding assessments on other property.

—EX-GOV. THOS. E. BRAMLETTE, of Kentucky, died at his residence in Louisville, on the 12th instant, after an illness of several weeks. He was governor of Kentucky during the closing years of the war, but has since not taken active part in politics. He was regarded as one of the ablest and most prominent lawyers at the bar, and a short time since, acted temporarily as judge of the federal court during the absence of Judge Ballard. He died of rheumatism of the heart.

—A QUESTION OF LAW.—A novel question has been submitted to the secretary of war, relative to the law of government contracts. It seems that there were twenty-seven American bids and one Canadian bid for the improvement of the Saut Ste. Mary's canal, and that the Canadian bid was the lowest of all. The lowest Amerian bidder has raised the point whether the term lowest bidder, as used in the act, includes foreign bidders, so that they can obtain government work to the exclusion of American citizens. The question will soon be determined by the secretary of war.

—HON. S. S. COX has introduced in the lower house of Congress, a bill to provide for the enforcement of the payment of subscriptions to the stock of corporations. It provides, in effect, that when any bill, note, bond, or coupon, payable to bearer and issued by any corporation chartered by the United States, except national banks, remains unpaid after maturity, the holder may sue any subscriber or stockholder of the corporation, whose subscription or stock has not been fully paid, and recover judgment for a sum not exceeding, in amount the unpaid subscription.

—JUDICIAL DISTRICT OF NEBRASKA.—Mr. Lener, chairman of the committee on expenditures in the department of justice, yesterday presented the report of that committee upon a resolution of the house directing a special enquiry into the expenses of the United States courts for Nebraska. The report fully acquits the officials of that district of the imputation that expenditures there have been excessive or fraudulent, and proves, from the record of the treasury, a large decrease during the last two years, and, considering that fact as proof of honesty and economy in the administration, in the absence of specifications to the contrary, asks to be discharged from the further consideration of the resolution.—*Washington Chronicle.*

—THE country cannot get along without the lawyers after all. Most of the senators who have been elected by the legislatures this fall are lawyers. Of these may be instanced Cockerell of Missouri, Kernan of New York (author of Kernan's Reports), McDonald of Indiana, and most distinguished of all, Chistiancy, of Michigan. Isaac P. Christiancy, the new senator from that state, has been for seventeen years one of the justices of the supreme court, and part of the time chief justice. He has been elected to this position twice by a unanimous vote of both parties. In politics he was originally a democrat, had been a free-soiler, and then a republican. He is 63 years old, and a resident of Lansing. He is understood to be for hard money and revenue tariff, conservative on constitutional questions, and a man of marked ability.